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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 931

THE FRANKLIN LIFE INSURANCE COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion below (R. 8–14) is reported in 37 F. Supp. 155.

JURISDICTION

The judgment of the Court of Claims was entered March 3, 1941 (R. 14). The petition for a writ of certiorari was filed April 8, 1941 (R. 14). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether transfers of securities between an insurance company and the Illinois Director of Insurance, in conjunction with the issuance of "registered" policies under Section 241 of the Illinois insurance laws, are subject to the federal documentary stamp tax.

2. Whether, if the transfers are subject to the stamp tax, the tax is constitutional.

STATUTES INVOLVED

The pertinent federal and state statutes are set forth in the Appendix, *infra,* pp. 8–14.

STATEMENT

The special findings of fact by the court below (R. 4–8) may be summarized as follows:

Petitioner is an insurance corporation organized under the laws of the State of Illinois, with its principal place of business in the City of Springfield, Illinois. Under the laws of Illinois (Smith-Hurd, Ill. Rev. Stats. 1931, c. 73), in force from July 1, 1899, to June 30, 1937, any life insurance company incorporated in Illinois was permitted to deposit securities with the state Director of Insurance equal to the legal reserves on a certain group of policies to be designated "registered" policies (R. 4–5). These policies were then stamped by the Director of Insurance and the following legend placed thereon (R. 5):

> This policy is registered; and approved securities, equal in value to the legal reserve hereon, are held in trust by this department.

While registration was discontinued in Illinois in 1937, the companies with registered policies in force have been required to maintain their deposits (R. 6).

During the period of deposit, depositing companies have the right to withdraw securities and substitute others of equal value and character in their stead and, so long as the depositing company is solvent and keeps up its deposits, it may collect the interest or other income on the deposited securities. No authority exists in the Director of Insurance to dispose of the deposited securities except back to, or at the direction of, the depositing company, except upon insolvency, procedure for which is provided by special statute (R. 6).

Upon insolvency of the insurance company or failure to maintain its deposits as required, the insurance act provides a special procedure under which, after appropriate court order, the Director of Insurance appoints a receiver who operates the company for the benefit of the policyholders (R. 6).

Petitioner elected to issue registered policies and, as a result, has from time to time both deposited securities with and withdrawn securities from the Director of Insurance under the statutes (R. 6). As to unregistered bonds so deposited

petitioner used the following legend stamped across the face of each bond (R. 7):

> This (bond) is the property of and deposited by The Franklin Life Insurance Company, of Springfield, Illinois, with the Director of Insurance of the State of Illinois, and held by him in trust for the benefit and security of the members, policyholders, or creditors of the said The Franklin Life Insurance Company, as required by and pursuant to the laws of the State of Illinois. It is not negotiable or transferable until withdrawn from said trust, at which time it shall be endorsed by the Director of Insurance.

When securities were withdrawn, the following form of endorsement was used by the Director of Insurance (R. 7):

> Withdrawn from above trust this — day of ——, A. D. 19—. Without recourse on me.
>
> ——— ———, as Director of Insurance of the State of Illinois.

Prior to October 1939 neither the petitioner nor the State of Illinois purchased or used federal documentary transfer stamps under Schedule A–9 of Title VIII of the Revenue Act of 1926, as added by Section 724 (a) of the Revenue Act of 1932. On October 2, 1939, the Collector of Internal Revenue at Springfield, Illinois, required petitioner to purchase documentary stamps to

cover deposits and withdrawals during the period from January 14, 1936, to August 8, 1939. The deposits during the period totaled $5,443,000, and the withdrawals totaled $1,162,000. The stamps thereon amounted to $2,177.20 and $564.80, respectively, or a total of $2,742 (R. 7).

On November 3, 1939, petitioner filed a claim for refund in the amount of $2,742, which was rejected by the Commisisoner of Internal Revenue on November 20, 1939 (R. 7–8). Petitioner thereupon instituted the present suit in the Court of Claims (R. 1). That court dismissed the petition and entered judgment for the United States (R. 14).

ARGUMENT

The court below held, first, that the stamp tax was applicable to the transfers between petitioner and the Director of Insurance, and second, that collection of the tax from petitioner did not impose an unconstitutional burden on the State of Illinois. Neither ruling involves a conflict of decisions or presents a question of general importance and both are patently correct.

1. Schedule A–9 of Title VIII of the Revenue Act of 1926, as added by Section 724 (a) of the Revenue Act of 1932 (*infra,* p. 8), provides for the imposition of the stamp tax on all "sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to" securities of the type here involved. It is clear that under

this provision the transfer of the bare legal title to a security is taxable, even though the transferee acquires no beneficial interest in the security transferred. *Provost* v. *United States,* 269 U. S. 443; *Founders General Co.* v. *Hoey,* 300 U. S. 268, 274. Here there was concededly a transfer of the legal title to the bonds; indeed Section 240 of the Illinois insurance laws (*infra,* pp. 10–11) requires that the securities "shall be legally transferred" by the insurance company to the Director of Insurance and "shall be held by him in trust * * *." Under the decisions cited, therefore, the transfers were plainly taxable.

2. It is equally plain that the tax, so applied, does not impose an unconstitutional burden on the State of Illinois, both because the state's participation in the permissive registration of the policies is not an essential governmental function and because the collection of the tax from the petitioner did not impose any burden on the state.

(a) The court below, after considering the nature of the permissive registration plan, concluded (R. 13): "Altogether it seems that the plan was devised rather in the interest of home insurance companies than of the public." This conclusion is, we believe, amply warranted. Not only was the registration of policies optional with the insurance companies, but it was available only for domestic companies. Manifestly, a statute which is not only permissive so far as domestic

insurance companies are concerned, but which also excludes all foreign insurance companies doing business within the state, is not an exercise of the police power of the state for the protection of its citizens. Consequently, the participation of the state in the registration plan is outside the scope of its essential governmental functions.

(b) It is equally clear that the collection of the stamp tax from petitioner imposed no burden, economic or otherwise, upon the state. Petitioner's argument, in effect, is that a tax imposed on a transaction to which the state is a party is unconstitutional. The decisions of this Court establish the contrary. *Helvering* v. *Gerhardt,* 304 U. S. 405; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466; *Allen* v. *Regents,* 304 U. S. 439; *James* v. *Dravo Contracting Co.,* 302 U. S. 134.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1941.